

BRAD W. SEILING (Bar No. CA 143515)
JOANNA MCCALLUM (Bar No. CA 187093)
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224
E-mail: bseiling@manatt.com; jmccallum@manatt.com

CLAUDIA CALLAWAY (*pro hac vice* application pending)
MANATT, PHELPS & PHILLIPS, LLP
700 12th Street, N.W.
Washington, DC 20016
Telephone: (202) 585-6504
Facsimile: (202) 585-6600
E-mail: ccallaway@manatt.com

JESSE S. FINLAYSON (Bar No. CA 179443)
MICHAEL R. WILLIAMS (Bar No. CA 196863)
FINLAYSON, AUGUSTINI & WILLIAMS LLP
110 Newport Center Drive, Suite 100
Newport Beach, CA 92660
Telephone: (949) 759-3810
Facsimile: (949) 759-3812
E-mail: jfinlayson@faw-law.com; mwilliams@faw-law.com

Attorneys for Defendant
CashCall, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRICIA LECKLER, on behalf of
herself and all others similarly
situated,

Plaintiffs,

vs.

CASHCALL, INC.,

Defendant.

Case No. C 07-04002 SI

DEFENDANT'S NOTICE OF MOTION
AND MOTION FOR CERTIFICATION
OF ORDER FOR INTERLOCUTORY
APPEAL AND FOR STAY OF
PROCEEDINGS; MEMORANDUM OF
POINTS AND AUTHORITIES
[28 U.S.C. § 1292(B)]

[Filed concurrently with [Proposed]
Order Certifying Order for Interlocutory
Review and Staying Proceedings]

Date: July 25, 2008
Time: 9 a.m.
Place: Courtroom 10

Judge: Hon. Susan Illston

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 25, 2008, at 9:00 a.m., or as
3 soon thereafter as the matter may be heard, in Courtroom 10 of the above-entitled
4 Court, located at 450 Golden Gate Avenue, San Francisco, California, 94102-3483,
5 defendant CashCall, Inc. will and hereby does move this Court for an order
6 pursuant to 28 U.S.C. § 1292(b) certifying the Court's May 20, 2008 Order for
7 interlocutory appeal to the Ninth Circuit Court of Appeals and for a stay of
8 proceedings pending appeal. Defendant requests oral argument on this Motion.

9 This Motion is based on this Notice of Motion, the accompanying
10 Memorandum of Points and Authorities, all pleadings, papers and records on file
11 herein, any matter of which the Court may take judicial notice, and such oral
12 argument as may be presented at the hearing on this Motion.

13
14 Dated: June 6, 2008

FINLAYSON, AUGUSTINI & WILLIAMS LLP
MANATT, PHELPS & PHILLIPS, LLP

15
16
17 By: 

18 Brad W. Seiling
19 Attorneys for Defendant
CashCall, Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant CashCall, Inc. ("CashCall") respectfully requests that this
4 Court certify for immediate appellate review its May 20, 2008 Order denying
5 CashCall's motion for partial summary judgment and granting plaintiff Tricia
6 Leckler's ("Leckler") motion for partial summary judgment (the "Order").
7 Certification is appropriate where, as here, an order (1) "involves a controlling
8 question of law" (2) "as to which there is substantial ground for difference of
9 opinion," and (3) an "immediate appeal . . . may materially advance the ultimate
10 termination of the litigation." 28 U.S.C. § 1292(b).

11 The question at issue is both narrow and dispositive of the claims
12 before the Court: whether a borrower, who provides a lender her cell phone number
13 in connection with a loan transaction, has granted "prior express consent" for the
14 lender to call her at that number in an effort to collect on a delinquent loan, using
15 automated dialing systems or prerecorded messages, for the purposes of the
16 Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(A).
17 *See* Order at 3:24-26.

18 CashCall submits that the Order meets each of the three grounds for
19 certification for interlocutory review set forth in 28 U.S.C. § 1292(b). First, the
20 Order presents a controlling question of law, in that a different interpretation by the
21 Ninth Circuit of the TCPA provision at issue would require reversal of the Order.
22 Second, the question presents a substantial ground for difference of opinion,
23 because the sole authority on point is an agency ruling issued by the federal agency
24 charged with interpreting the TCPA, to which the Court declined to give deference,
25 relying instead upon cases interpreting a different statutory provision that has since
26 been amended. Finally, immediate appeal would materially advance the
27 termination of the litigation, in that reversal by the Ninth Circuit of this Court's
28

1 ruling with instructions to adhere to the federal agency's ruling would mandate
 2 dismissal of Leckler's complaint. CashCall respectfully requests that this Court
 3 certify its Order and stay further proceedings in this action pending appeal.

4 **II. BACKGROUND**

5 The material facts are undisputed. *See* Jointly Submitted Statement of
 6 Undisputed Facts in Support of the Parties' Cross-Motions for Partial Summary
 7 Judgment, D.E. 32.

8 In December 2005, Leckler applied to CashCall for a personal loan.
 9 (*Id.* No. 2.) As part of the loan application process, Leckler provided her cell phone
 10 number to CashCall. (*Id.* Nos. 3, 4.) On subsequent correspondence with CashCall
 11 regarding the loan, Leckler supplied her cell phone number as the sole contact
 12 information. (*Id.* No. 18 & Ex. A.) Leckler concedes that she gave consent for
 13 CashCall to contact her at her cell phone number. (D.E. 44 at p. 8.) When she fell
 14 behind on her loan payments, CashCall placed calls to her on her cell phone line to
 15 request payment. (D.E. 32 Nos. 8, 9.) Some of these calls were made via
 16 automatic dialing system and/or used prerecorded messages. (*Id.* Nos. 10, 11.)

17 Leckler brought this putative nationwide class action suit against
 18 CashCall, alleging intentional and negligent violations of the TCPA, 47 U.S.C.
 19 § 227(b)(1)(A). That statute provides, in relevant part:

20 It shall be unlawful for any person within the United States . . . to
 21 make any call (other than a call made for emergency purposes or *made*
 22 *with the prior express consent of the called party*) using any automatic
 23 dialing system or an artificial or prerecorded voice . . . to any
 24 telephone number assigned to a paging service, cellular telephone
 service, specialized mobile radio service, or other radio common
 carrier service, or any service for which the called party is charged for
 the call

25 47 U.S.C. § 227(b)(1)(A) (emphasis added).

26 The parties each filed motions for partial summary judgment, based on
 27 stipulated undisputed material facts, on the pure legal issue of whether CashCall's
 28 calls to Leckler's cell phone number violated the TCPA. As support for its motion,

CashCall presented to the Court a ruling by the Federal Communications Commission ("FCC"), the federal agency charged with interpreting 47 U.S.C. § 227(b)(1)(A), that a borrower's disclosure to a lender of a cell phone number with regard to obtaining a loan constituted the "prior express consent" sufficient to avoid a TCPA violation. *See Declaratory Ruling in re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 07-232 (Dec. 28, 2007; released Jan. 4, 2008) (the "FCC Ruling"). On May 20, 2008, this Court issued its Order, granting Leckler's motion and denying CashCall's motion.

III. THE QUESTION SATISFIES THE FACTORS FOR CERTIFICATION PURSUANT TO 28 U.S.C. SECTION 1292(B).

A. The Question Presents a Controlling Issue of Law.

The question set forth above is dispositive of Leckler's complaint. *See APCC Services, Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 105 (D.D.C. 2003) ("a 'controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources' . . . [and] include[s] issues that would terminate an action if the district court's order were reversed") (citation omitted)¹; *see In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court.").

As this Court noted, its decision on the issue presented by the motions "hinges on the propriety of a ruling by the Federal Communications Commission ('FCC')" (Order at 3:26-27.) The FCC has recently considered the precise issue presented in this case, and determined, in a ruling adopted December 28, 2007, that a borrower's disclosure to a lender of a cell phone number with regard to

¹ The Ninth Circuit accepted *APCC* for interlocutory appeal and reversed the order. The Supreme Court subsequently vacated the judgment. Following remand, *certiorari* was granted again, and the matter is pending in Supreme Court.

obtaining a loan constituted the “prior express consent” sufficient to avoid a TCPA violation. *See* FCC Ruling ¶ 9 (finding that “autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party”). This Court analyzed the FCC Ruling under the standard set forth in *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), and determined not to accord deference to the ruling, finding that the FCC’s interpretation was inconsistent with the TCPA’s plain language. (Order at 6:7-9.) On that basis, the Court denied CashCall’s motion and granted Leckler’s motion.

If the Ninth Circuit were to reach a contrary conclusion and agree with the FCC’s interpretation, that would mandate the denial of Leckler’s motion and the grant of CashCall’s motion, resulting in the dismissal of Leckler’s complaint. The issue therefore is controlling.

B. There Is Substantial Ground for Difference of Opinion.

There is also a substantial ground for difference of opinion. “A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. . . . A substantial ground for dispute also exists where a court’s challenged decision conflicts with decisions of several other courts.” *APCC*, 297 F. Supp. 2d at 107. A district court’s decision to certify its order does not mean that the district court questions whether its own decision was correct, *see APCC*, 297 F. Supp. 2d at 107; it means that the court recognizes that there are “not insubstantial” arguments to the contrary. *Id.*

Here, the sole and controlling authority on point is the FCC Ruling, which is in accord with CashCall’s position. *See* FCC Ruling ¶ 9 (finding that “autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party”). Leckler’s motion tacitly acknowledged that

1 adherence to the FCC's position would end her lawsuit. In fact, she specifically
 2 asked that the Court "nullify the FCC ruling for purposes of this lawsuit." (D.E. 35
 3 at 2.)

4 This Court disagreed with the FCC Ruling's conclusion. *See* Order at
 5 7:24-25 ("The problems inherent in finding express consent based on conduct that
 6 'in effect' amounts to express consent or 'is deemed' to amount to express consent
 7 are self-evident and need no explanation."). The Court also found that while
 8 Leckler may have given consent to be called on her cell phone, that consent was not
 9 specifically directed to calls using automated dialing systems or prerecorded
 10 messages. (Order at 6:16-21.)

11 As the Court noted, there is an absence of case authority interpreting
 12 the meaning of "prior express consent" under 47 U.S.C. § 227(b)(1)(A) on similar
 13 facts, and there is no case authority discussing the FCC Ruling.² *See Paiute-*
 14 *Shoshone Indians of the Bishop Community v. City of Los Angeles*, No. 1:06-cv-
 15 0736 OWW SMS, 2007 WL 2202242, at *2 (E.D. Cal. July 30, 2007) ("the
 16 question is whether [the issue] has ever been analyzed in the context of facts and
 17 circumstances that resemble those of this case. . . . [N]one [of the other cases]
 18 concerned factual circumstances similar enough to this case to provide clear
 19 guidance. There are substantial grounds for difference of opinion."). The Court
 20 also noted the conflicting inferences to be drawn from the TCPA's legislative
 21 history. (Order at 11:1-16 (noting FCC Ruling's citation to H.R. Rep. 102-317 at
 22 17 (Nov. 15, 1991) and Leckler's citation to S. Rep. 102-178 at 3-4 (Oct. 8, 1991).)

23 In support of its ruling, the Court cited several state-law cases that
 24 analyzed the meaning of express consent for the purposes of a different provision of

25 ² In *Satterfield v. Simon & Schuster*, No. C 06-2893 CW, 2007 WL 1839807 (June
 26 26, 2007), the court determined that the plaintiff expressly consented to receive the
 27 defendant's solicitations by text message to her cell phone, by submitting the cell
 28 phone number to the defendant on a web site that required her to indicate her
 agreement to the defendant's use of the cell phone number in connection with "any
 text message offering or other campaign."

the TCPA, Section 227(b)(1)(C), which pertains to unsolicited advertising sent by fax. *See* Order at 8 (discussing, *inter alia*, *Weitzner v. Iridex Corp.*, No. 05-CV 1254 (RJD), 2006 WL 1851441 (E.D.N.Y. June 29, 2006); *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W. 3d 365, 394 (Tex.App. – Houston 2004), *overruled on other grounds*, 184 S.W.3d 707 (Tex. 2006); *Travel Travel, Kirkwood, Inc. v. Jen N.Y. Inc.*, 206 S.W. 3d 387, 392 (Mo. App. 2006).

CashCall respectfully submits that the state court decisions relied upon by the Court are not analogous to the issue here, for three reasons. First, they address different language in different provisions of the TCPA, 47 U.S.C. §§ 227(b)(1)(C) and 227(a)(5), which pertain to unsolicited advertising transmitted via fax, not to automated or prerecorded calls to cell phones. The separate statutory sections respond to different legislative and regulatory concerns. *See* FCC Ruling ¶ 7 (observing that “Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls, and that such calls can be costly and inconvenient”); *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 272 F. Supp. 2d 1365, 1375 (S.D. Ga. 2003) (noting that Section 227(b)(1)(C) is designed in part to “redress harms to individuals who are forced to absorb the costs associated with receiving unsolicited faxes”), *aff’d*, 157 Fed. Appx. 201 (11th Cir. 2005).

Second, the cited cases purported to rely on the plain language of the TCPA to reject an FCC interpretation, which had created an exemption to the prohibition on unsolicited faxed advertising where the sender and recipient had an “existing business relationship” (“EBR”).³ *See Weitzner*, 2006 WL 1851441, at *2-*3; *see also Biggerstaff v. FCC*, 511 F.3d 178, 181 (D.C. Cir. 2007). As it turned

³ EBR is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(5).

1 out, Congress ultimately agreed with the FCC that such an exception was
2 appropriate, and in 2005, Congress enacted the Junk Fax Protection Act of 2005,
3 Pub. L. No. 109-21, 119 Stat. 359, in which it amended Section 227(b)(1)(C) to
4 expressly include an exception to the prohibition on faxed advertising where the
5 parties had an EBR. Thus, Congress essentially adopted the FCC's exception. As
6 Congress may be presumed to act with full knowledge of existing judicial
7 interpretation of the law, that amendment may be seen as responsive to these
8 judicial and administrative decisions. *See United States v. Alvarez-Hernandez*, 478
9 F.3d 1060, 1065 (9th Cir. 2006) ("We . . . 'presume that when Congress amends a
10 statute, it is knowledgeable about judicial decisions interpreting the prior
11 legislation.'") (citation omitted).

12 The third reason these cases do not provide guidance here is that they
13 are distinguishable. In this case, Leckler gave her consent because she disclosed
14 her cell phone number for the specific purpose of allowing CashCall to contact her
15 with respect to a particular loan transaction, and the calls were made with regard to
16 that loan. *See FCC Ruling* ¶ 10 ("We emphasize that prior express consent is
17 deemed to be granted only if the wireless number was provided by the consumer to
18 the creditor, and that *such number was provided during the transaction that*
19 *resulted in the debt owed.*") (emphasis added). It is reasonable to find express
20 consent in this context.

21 In contrast, the notion of a prior established business relationship as
22 constituting consent is far more attenuated. Thus, it was reasonable to conclude, as
23 those courts did, that transacting business in the past cannot amount to consent to
24 receive later unsolicited faxes seeking to advertise or promote the sender's business
25 as to any matter completely unrelated to the parties' prior dealings. *See, e.g.,*
26 *Weitzner*, 2006 WL 1851441 (discussing whether doctor's prior business
27 relationship with defendant amounted to consent to receive subsequent unsolicited
28 faxes advertising defendant's goods and services); *Chair King*, 135 S.W. 3d at 394

(no presumptive permission for defendant to send fax advertisements to an existing customer); *Travel Travel, Kirkwood*, 206 S.W. 3d at 392 (disclosure of fax number through membership in trade association not consent to receive faxed advertisements).

The sole on-point authority is the FCC Ruling, to which this Court did not defer. No alternative dispositive precedent exists in this Circuit or in any court; indeed, this Court relied upon state cases interpreting a superseded version of a different statutory section. This Court's Order represents the sole published authority discussing the FCC Ruling or addressing whether under these circumstances there is express consent. There is a substantial ground for difference of opinion.

C. Appellate Resolution Would Materially Advance the Termination of the Litigation.

Resolution of this question in favor of CashCall will materially advance the ultimate termination of the litigation, because a ruling for CashCall would mandate dismissal of Leckler's complaint. *See Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 313 (S.D.N.Y. 2007) (certifying for appeal under Section 1292(b) the question whether electronic fund transfers are "property" subject to the maritime attachment laws; "if [appellant] prevails on appeal, the Rule B attachment will be vacated, which . . . the parties do not dispute will result in the termination of this litigation").

All that would remain is CashCall's counterclaim pertaining to Leckler's non-payment of her debt, a limited and significantly streamlined issue of individual breach of contract, without any nuances of statutory interpretation or the expense and burden of class proceedings. There is no requirement that a question certified pursuant to 28 U.S.C. § 1292(b) be dispositive of the entire action, as long as it "materially affect[s] the outcome of the litigation in district court." *In re Cement*, 673 F.2d at 1026. Even if early appellate guidance does not completely

1 dispose of the case, the issues will be narrowed and streamlined, obviating
2 unnecessary litigation over irrelevant issues. *See Ryan v. Flowserve Corp.*, 444 F.
3 Supp. 2d 718, 723 (N.D. Tex. 2006) (courts should consider whether the
4 interlocutory appeal will “speed up the litigation” or will “minimize burdens ‘by
5 accelerating or . . . simplifying trial court proceedings’”) (quoting 16 Wright, Miller
6 & Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 3930 (2d ed. 1996); other citation
7 omitted).

8 The parties submitted cross-motions for summary judgment based
9 upon stipulated undisputed facts, so no factual issues need to be resolved. The
10 motions present flip sides of a single, purely legal issue. If CashCall’s analysis and
11 interpretation of the legal issue prevail on appeal, the bulk of the case – and the
12 entire putative class action, involving potentially “in the tens of thousands, if not
13 more” members and millions of dollars in damages – will be ended. (Order at
14 2:17-24 (citing complaint).) If the Ninth Circuit reaches a conclusion different
15 from that of this Court, it should do so now, prior to the lengthy – and expensive –
16 process of engaging in class certification discovery, depositions, pleadings and
17 argument. Conservation of judicial and party resources that could be avoided if the
18 court’s judgment is reversed is an important consideration in granting certification
19 under 28 U.S.C. § 1292(b). *See APCC*, 297 F. Supp. 2d at 105. The vast scope of
20 this putative (and allegedly nationwide) class action renders it precisely the
21 “exceptional situation[] in which allowing an interlocutory appeal would avoid
22 protracted and expensive litigation.” *In re Cement*, 673 F.2d at 1026.

23 Moreover, swift appellate resolution may have broader impact beyond
24 this case. The FCC has only recently issued its Ruling, which now stands
25 definitively at odds with this Court’s published decision, so resolution by an
26 appellate court may affect agency proceedings or cause the FCC to alter or amend
27 its position. Appellate interpretation might even lead to Congress acting to make
28 clarifying amendments to the statute itself, as it did in the 2005 amendments to the

1 TCPA's fax provisions. Thus:

2 The industry as a whole would . . . benefit from a ruling from the
3 Court of Appeals, for not only will the resolution of these issues be
4 dispositive of the cases before this Court, but it will provide persuasive
authority for courts in other jurisdictions, as well as for the FCC.

5 *APCC*, 297 F. Supp. 2d at 106-07 (granting a motion for 1292(b) certification).

6 **IV. A STAY OF PROCEEDINGS PENDING APPEAL IS WARRANTED.**

7 A stay of proceedings pending the requested interlocutory appeal is
8 necessary in order to preserve the benefits that appellate resolution in CashCall's
9 favor would offer. In addition to the approaching class certification briefing,
10 Leckler has recently served CashCall with discovery requests. No purpose is
11 served in expending resources on these matters pending appellate resolution.

12 Where a stay is requested in the Section 1292(b) context:

13 [B]y statute, this court has authority to stay the proceedings pending an
14 interlocutory appeal. This court also possesses the inherent power to
15 control its own docket and calendar. "A district court has inherent
16 discretion to control the disposition of the causes on its docket in a
17 manner which will promote economy of time and effort for itself, for
counsel, and for litigants." *Filtrol Corp. v. Kelleher*, 467 F.2d 242,
244 (9th Cir.1972) (quotations and citations omitted). In
Mediterranean Enterprises, Inc. v. Ssangyong Corp., [708 F.2d 1458,
1465 (9th Cir.1983),] the Ninth Circuit recognized:

18 A trial court may, with propriety, find it is efficient for its own docket
19 and the fairest course for the parties to enter a stay of an action before
20 it, pending resolution of independent proceedings which bear upon the
21 case. This rule . . . does not require that the issues in such proceedings
are necessarily controlling of the action before the court. [citation
omitted] . . .

22 Because a reversal of this court's Order by the Ninth Circuit could
23 materially affect this case and advance the ultimate termination of
24 litigation, the court stays this action in its entirety pending resolution
of defendant's appeal of the Order. Said stay promotes economy of
time and effort both for the court and the parties.

25 *Watson v. Yolo County Flood Control & Water Conserv. Dist.*, 2:06-cv-1549 FCD
26 DAD, 2007 WL 4107539 (E.D. Cal. Nov. 16, 2007), at *2-*4. Allowing discovery
27 and class certification proceedings to move forward while the appellate court is
28 considering the controlling legal issue would be illogical and would promote

1 exactly the waste of resources that interlocutory review would prevent.

2 **V. CONCLUSION**

3 For the foregoing reasons, CashCall requests that certification be
4 granted and further proceedings stayed pending appellate resolution.

5 Dated: June 6, 2008

Respectfully submitted,

6 FINLAYSON, AUGUSTINI & WILLIAMS LLP

7 MANATT, PHELPS & PHILLIPS, LLP

8
9 By: 

10 Brad W. Seiling

11 *Attorneys for Defendant CashCall, Inc.*

PROOF OF SERVICE

I, Brigitte Scoggins, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On June 6, 2008, I served a copy of the within document(s):

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL AND FOR STAY OF PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES [28 U.S.C. § 1292(b)]

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Douglas J. Campion, Esq.
LAW OFFICES OF DOUGLAS J. CAMPION
411 Camino Del Rio South, Suite 301
San Diego, CA 92108

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on June 6, 2008, at Los Angeles, California.


Brigitte Scoggins